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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/556,125	11/09/2005	Edward C. Meagher	2897US(203-3703PCTUS)	4353

50855 7590 01/12/2011

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EXAMINER
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WEEKS, GLORIA R

ART UNIT	PAPER NUMBER
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3721

MAIL DATE	DELIVERY MODE
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01/12/2011

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.



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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 10/556,125  
Filing Date: November 09, 2005  
Appellant(s): MEAGHER, EDWARD C.

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Russell S. Salemo  
For Appellant

**EXAMINER'S ANSWER**

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This is in response to the appeal brief filed November 3, 2010 appealing from the Office action mailed June 17, 2010.

**(1) Real Party in Interest**

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The following is a list of claims that are rejected and pending in the application: Claims 1-8.

**(4) Status of Amendments After Final**

The examiner has no comment on the appellant's statement of the status of amendments after final rejection contained in the brief.

**(5) Summary of Claimed Subject Matter**

The examiner has no comment on the summary of claimed subject matter contained in the brief.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except

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for the grounds of rejection (if any) listed under the subheading “WITHDRAWN REJECTIONS.” New grounds of rejection (if any) are provided under the subheading “NEW GROUNDS OF REJECTION.”

### **(7) Claims Appendix**

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant’s brief.

### **(8) Evidence Relied Upon**

6,045,560	McKEAN	4-2000
5,263,629	TRUMBULL et al.	11-1993

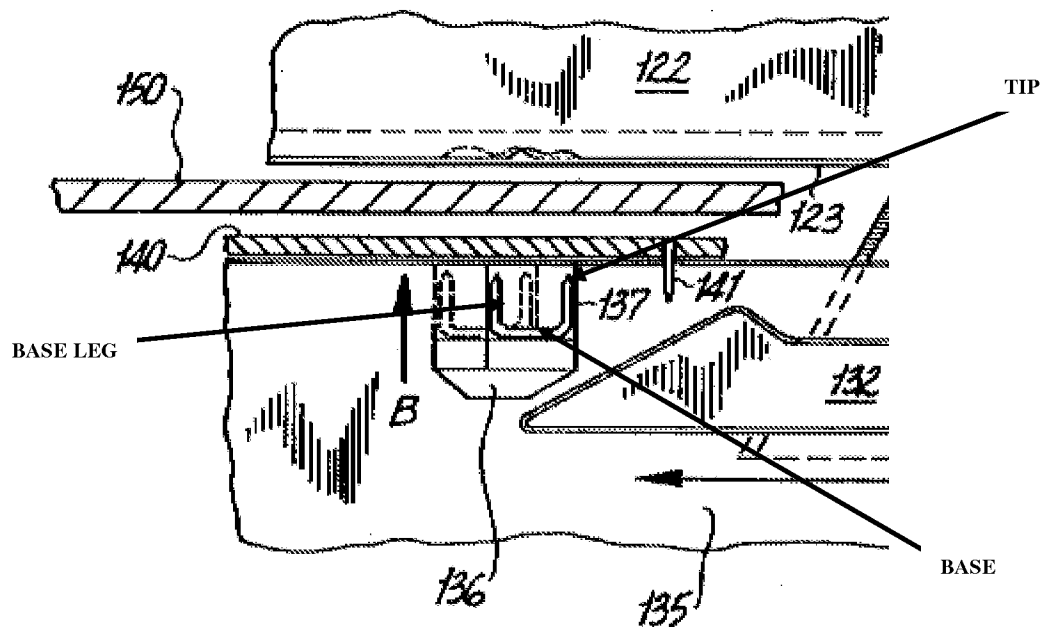
### **(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

**Claims 1-5 and 7 are rejected under 35 U.S.C. 102(b) as being anticipated by McKean et al. (USPN 6,045,560).**

In reference to claims 1-5 and 7, McKean et al. discloses a surgical fastener system comprising: a fastener including a base leg and a support leg, the base leg being selectively deformable and including at least one traumatic tip for piercing tissue, and at least one capillary 140 having a reservoir (cellulose material) therein for retaining a liquid (column 4 lines 13-30, line 67- column 5 line 4) such that the capillary is rupturable (penetrated by tip) with the deformation of the surgical fastener; a loading unit 135; and an actuator 132.

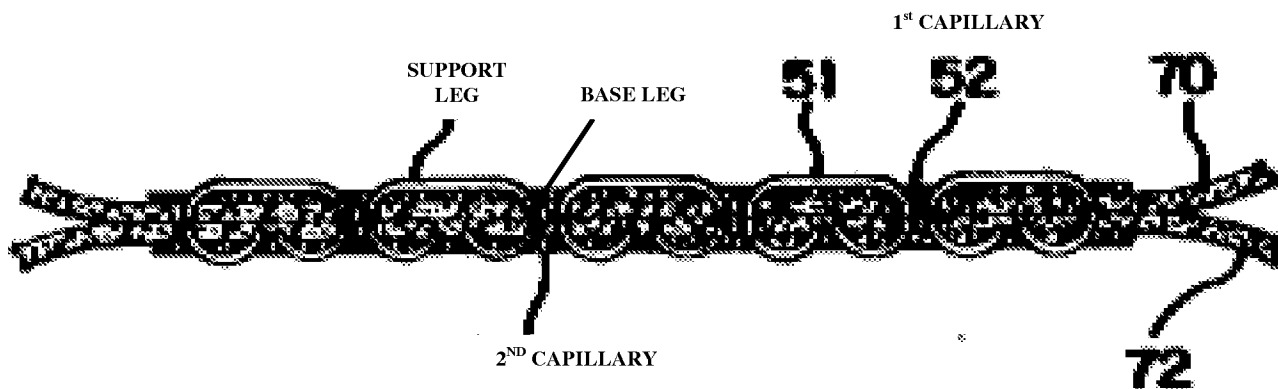
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**Claims 6 and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over McKean et al. (USPN 6,045,560) in view of Trumbull et al. (USPN 5,263,629).**

Regarding claims 6 and 8, McKean discloses a single liquid filled capillary on a base leg of a fastener. Trumbull et al. teaches a fastener that sequentially ruptures a first and second capillary 52, such that the first and second capillary 52 are on an external surface of the base leg (figure 5 - see figure 5 diagram of Trumbull et al.). It would have been obvious to one having ordinary skill in the art at the time of the invention to modify the surgical fastener of McKean to include a second capillary as suggested by Trumbull et al. for the purpose of treating a second layer of tissue sutured by the surgical fastener.

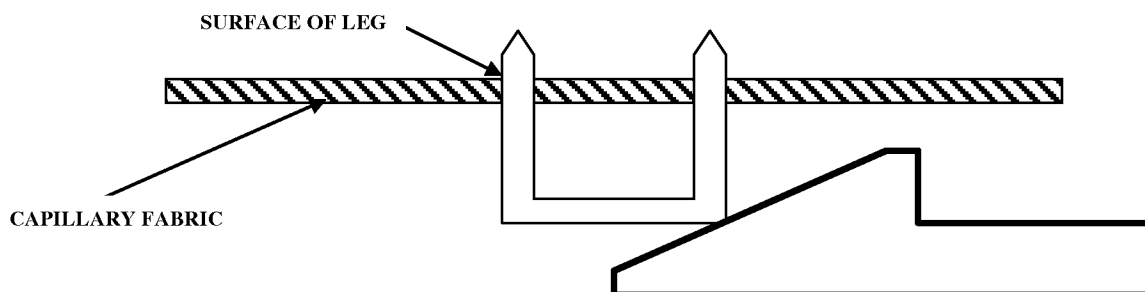
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### (10) Response to Argument

**Examiner maintains the 35 U.S.C. 102(b) rejection of claims 1-5 and 7 as being anticipated by McKean, since a capillary as claimed is found to be disclosed by the reference.**

Appellant has argued that McKean et al. fails to disclose a fastener having a “capillary fixed to an external surface of at least one of the base leg or support leg”. As illustrated below, as the fastener of McKean is pushed from the cartridge, the fastener will penetrate a fabric material, which is porous (thereby defining a capillary structure), such that the fabric is fixed to an external surface of a leg of the fastener.



Appellant further argues that McKean et al. fails to teach the fabric as a liquid retaining structure. Appellant’s claim language is not written in a means plus function format. As presented, the claim limitations are drawn to “a capillary fixed to an external surface of at least one of the base leg or support leg (the capillary) having a reservoir defined **therein**”. Column 5

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lines 1-4 of McKean et al. states the fabric may include “therein” useful substances such as drugs, enzymes and proteins. Whether the substance “therein” is liquid, gel or solid does not negate the structural disclosure by McKean et al of a capillary defining a reservoir capable of containing a substance.

In response to appellant’s argument that the surgical fastener of McKean et al. is unable to rupture the capillary while simultaneously being deformed, Examiner would like to note column 3 lines 53-55 of McKean et al. states that a fabric/capillary can be provided against both the cartridge and anvil of a surgical fastener. During operation of the surgical stapler, the surgical fastener can be ejected from a cartridge to pierce and rupture a capillary/fabric oriented adjacent to the anvil. As the legs of the surgical fastener are deformed by the anvil, the points of the surgical fastener are able to re-enter the fabric oriented adjacent the anvil at a second position, thus rupturing the fabric/capillary during deformation of the surgical fastener.

**Examiner maintains the 35 U.S.C. 102(b) rejection of claims 6 and 8 as being unpatentable over McKean in view of Trumbull, since the arguments against claims 6 and 8 stand/fall on that of claims 1 and 2.**

With respect to the rejection of claims 6 and 8, Appellant has relied upon the teaching of Trumbull to provide a first and second capillary structure to the external surface of a fastener. Examiner hereby applies upon the same rationale of the reservoir defined structure as presented above in view of McKean et al. to address page 5 of the arguments presented by Appellant on March 23, 2010.

#### **(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner’s answer.

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For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Gloria R. Weeks/  
Examiner, Art Unit 3721

Conferees:

/Rinaldi I Rada/  
Supervisory Patent Examiner, Art Unit 3721

/Henry Yuen/  
Supervisory Patent Examiner, TC 3700

January 11, 2011